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In the Supreme Court of the United States

OCTOBER TERM, 1976

JAMES E. DOUGLAS, JR., APPELLANT,

v.

SEACOAST PRODUCTS, INC.,
THE NEW SMITH MEAL COMPANY, INC.,
AND SECOND OCEANIC CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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OPINION BELOW

The opinion of the three-judge district court (App. 16–22) is not yet reported.

JURISDICTION

On November 7, 1975, the district court entered its order and final judgment enjoining enforcement of Virginia Code 28.1–60 and 28.1–81.1 "in respect to the prohibitions of the plaintiffs to engage in fishing for menhaden in Chesapeake Bay and in the Atlantic Ocean within three miles of the shore of Virginia" (App. 15).

Appellants filed their notice of appeal on March 5, 1976, and probable jurisdiction was noted on April 26, 1976. This Court's jurisdiction rests upon 28 U.S.C. 1253.

QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether Va. Code 28.1–60 and 28.1–81.1 conflict with the federal enrollment and licensing laws in regard to fisheries and are therefore unconstitutional under the Supremacy Clause of the Constitution.

2. Whether Va. Code 28.1–81.1 is preempted by the Bartlett Act, as amended, 16 U.S.C. 1081–1094.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Commerce Clause of the Constitution, Article I, Section 8, Clause 3, provides:

> The Congress shall have Power * * *
>
> * * * * *
>
> To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Virginia Code 28.1–60 and 28.1–81.1 are set forth in the Appendix, at pp. 114–118.

Section 1 of the Bartlett Act of 1964, 78 Stat. 194, as amended, 16 U.S.C. 1081, is set forth in the Appendix, at pp. 118–119.

The following provisions are set forth in an appendix to this brief: 46 U.S.C. 251, 252, 263.

INTEREST OF THE UNITED STATES

In its order noting probable jurisdiction, the Court invited the United States to express its views in this case. The substantial interest of the United States is indicated by the federal legislation involved here and the likelihood that the Court's decision in this case, interpreting federal statutes, will have a significant impact on federal-state relationships with respect to the regulation of fishing in the territorial sea adjacent to the States and in the internal waters of the States.

STATEMENT

This is an appeal from the decision of a three-judge district court holding Va. Code 28.1–60 unconstitutional and Va. Code 28.1–81.1 preempted by federal law.

Va. Code 28.1–60 prohibits nonresidents of Virginia from taking, without a license, fish in state waters or waters under the state's "joint jurisdiction" for "the purpose of converting [the fish] into oil, fish scrap, fish meal or guano." Licenses granted under this section to nonresident individuals or companies authorize only their fishing for "menhaden" east of a line drawn from Cape Charles Lighthouse to Cape Henry Lighthouse and within the three-mile limit of the Virginia coast during a specified season (between the third Monday of May and the third Friday of November).[1] See also Va. Code 28.1–59(d)(2). The effect of

[1] Residents are also required to adhere to the same fishing season for menhaden, although they are not restricted to fishing only outside the Chesapeake Bay as are nonresidents. Va. Code 28.1–65.

Section 28.1–60, therefore, is to prohibit entirely nonresidents from fishing for menhaden in the Chesapeake Bay.[2]

The other state statute involved here, Va. Code 28.1–81.1, became effective on March 19, 1975. This provides that no commercial license shall be granted to any person, firm, partnership or corporation for the taking of any "food fish" or fish to be manufactured into fish meal, fish oil or fish scrap if the person, firm or corporation is not a United States citizen. Under this state statute, which imposes requirements in addition to those under other state licensing provisions, a corporation is not a citizen of the United States unless seventy-five percent of the interest in it is owned by United States citizens; its president, chairman of the board of directors and majority of the directors needed to constitute a quorum are citizens of this country; and it is organized under federal or state law.

The effect of Section 28.1–81.1 is to bar noncitizens, as therein defined, from obtaining commercial fishing licenses for any kind of fish from the Commonwealth of Virginia regardless of where the noncitizens reside.[3] This case concerns the application of Section 28.1–81.1 with respect to the menhaden fishery.

[2] The waters of the territorial sea, as well as inland waters, are within the State's boundary. See the Submerged Lands Act, 67 Stat. 31, 43 U.S.C. 1312.

[3] Apparently, even residents of Virginia would not be allowed to obtain commercial fishing licenses if they were not considered citizens of the United States under Section 28.1–81.1.

The menhaden[4] is a non-edible herringlike fish that averages from four to fourteen inches in length. There are several species that range along the Atlantic Coast and the Gulf of Mexico, but the most common is the Atlantic menhaden (*Brevoortia tyrannus*), which is found from New England to Florida. The menhaden fishery annually contributes approximately forty-five percent of the total United States commercial catch of fresh and saltwater fish combined (App. 99).

The menhaden catch is processed into fish meal, fish oil and fish solubles (*id.* at 33). Fish meal and solubles are rich in protein and are used as food supplements for poultry and other animals; fish oil is domestically used in various commercial products including paints, soaps and lubricants and is exported to Europe and Canada for use in the manufacture of margarine; fish meal is also used by pharmaceutical companies in

[4] It is commonly called the mossbunker, bunker, pogy and fatback. See generally Atlantic States Marine Fisheries Commission, *Atlantic Menhaden*, Leaflet No. 2, October 1965; Evanoff, *Menhaden*, in 36 *The Salt Water Sportsman* No. 9, p. 70 (September 1975).

[5] *Ibid.* See generally Nicholson, *Age and Size Composition of the Atlantic Menhaden, Brevoortia tyrannus, Purse Seine Catch, 1963–71 With A Brief Discussion Of The Fishery* (June 1975) (National Oceanic and Atmospheric Administration Technical Report NMFS SSRF–684); Kroger & Guthrie, *Migrations of Tagged Juvenile Atlantic Menhaden*, in 102 Transactions of the American Fisheries Society No. 2, 417 (April 1973); Schaaf & Huntsman, *Effects of Fishing on the Atlantic Menhaden Stock: 1955–1969*, in 101 *id.* at 290 (April 1972); Dryfoos, Cheek & Kroger, *Preliminary Analysis of Atlantic Menhaden, Brevoortis Tyrannus, Migrations, Population Structure, Survival and Exploitation Rates, and Availability As Indicated From Tag Returns*, 71 Fishery Bulletin 719 (1973).

the manufacture of antibiotics (*id.* at 33; *Atlantic Menhaden, supra*, note 4).

Atlantic menhaden spawn in the ocean over the Continental Shelf.[6] Fish hatched at sea off the coast of Virginia and north of Cape Hatteras, North Carolina,[7] tend to migrate into the Chesapeake and Delaware Bays in late winter or early spring (App. 74, 95). It appears that as many as ninety-five percent of the menhaden found in the Chesapeake Bay began their lives outside the Bay's waters (App. 98).

When they enter the Chesapeake Bay, the fry spread out through the Virginia and Maryland portions of the Bay (App. 95). Evidence developed from tagging operations conducted by the National Marine Fisheries Service indicates that of the one-year old fish tagged as juveniles in the Bay, a majority are caught there while others have been captured along the Atlantic coast as far south as Florida (App. 74–75, 96). It is not known how many of the one-year-old fish caught in the Bay had spent the preceding winter there (App. 96); at least some had left the Bay in the fall and returned the following spring (App. 75). Older fish—more than two years of age—tend to live outside the Bay, migrating southward in the fall, spending the winter at sea in an area not precisely known, and heading northward along the coast as summer approaches (App. 75, 95–97). Because female menhaden do not spawn until they are three years of age (App. 94),[8] repopulation of the Chesapeake Bay is dependent upon these three-year old or older fish spawning in the ocean off the mid-Atlantic Coast (App. 76, 99).[9]

[6] App. 93–95; *Atlantic Menhaden, supra*, note 4; note 5, *supra*.

[7] Fish hatched at sea south of Cape Hatteras tend to move toward the southern coast, entering estuaries from North Carolina to Florida (App. 94). See Dryfoos, Cheek & Kroger, *supra*, note 5.

During the summer months menhaden are found in dense schools close to the surface and are easily spotted because of the characteristic ripple they create (App. 24; note 4, *supra*). Most of the menhaden caught commercially along the Atlantic Coast are taken during this period; purse seines are used to capture the fish, which are then refrigerated and later processed on shore (App. 24, 33). It is not commercially feasible to fish for menhaden during the winter months when they are far off-shore in deeper waters (App. 24); the great percentage of the commercial catch is taken within three-miles of shore (App. 24).

Appellees Seacoast Products, Inc., and its wholly owned subsidiaries The New Smith Meal Company, Inc., and Second Oceanic Corporation are engaged in the business of fishing for menhaden and in processing the fish for commercial purposes (App. 17, 18). Each company is incorporated and has its principal place of business in a State other than Virginia.[10] Since 1973,

[8] Menhaden are known to live as long as twelve years but very few reach that age (App. 75).

[9] Approximately ninety percent of the commercial menhaden catch in the Chesapeake Bay consists of one and two year old fish (App. 77).

[10] Seacoast is incorporated in the State of Delaware and has its principal place of business in New Jersey; Smith Meal is incorporated in the Commonwealth of Massachusetts and has its principal place of business in New Jersey; Oceanic is incorporated in the State of New York and has its principal place of business in New York (App. 2, 18, 29).

Seacoast has been controlled, through stock ownership, by a Delaware corporation which in turn is owned by Hanson Trust Limited, a corporation organized and existing under the laws of the United Kingdom (App. 18).

Prior to the sale of stock to Hanson Trust, Seacoast and Smith Meal transferred their sixty-eight vessels to an individual who then sought the authorization of the Secretary of Commerce under 46 U.S.C. 808, 839, to transfer ownership of the vessels back to Seacoast and Smith Meal after Hanson Trust had assumed control (App. 29–30). The Secretary approved the transfer after public hearings were held to determine, among other things, the effect of the transfer on the menhaden fishery and the menhaden segment of the commercial fishing industry (App. 20–21, 31).[11]

Thereafter, the Seacoast and Smith Meal vessels were re-enrolled and relicensed as fishing vessels of the United States. This entitled them "to the privileges of vessels employed in the coasting trade or fisheries," 46 U.S.C. 251 (a) (App. 20–21, 31–32).

On May 22, 1975, appellee Smith Meal applied to the Virginia Marine Resources Commission for a Virginia menhaden license. In previous years the state Commissioner had issued such licenses to Seacoast or its subsidiaries (App. 62). In 1975, however, the state Commissioner refused to issue the license to Smith Meal on the basis that Smith Meal was held directly or indirectly by foreign interests and, under Va. Code

[11] See generally 46 C.F.R. Part 221.

28.1–81.1, was therefore ineligible for a fishing license (App. 34).

On July 14, 1975, appellees brought suit against James E. Douglas, Jr., Commissioner of the Virginia Marine Resources Commission, in the United States District Court for the Eastern District of Virginia, seeking an injunction against the operation of Va. Code 28.1–81.1 insofar as it barred noncitizens from obtaining Virginia fishing licenses and Va. Code 28.1–60(3) insofar as it prohibited nonresidents from fishing for menhaden in the Chesapeake Bay (App. 2–9). Appellees' complaint alleged that these Virginia statutes violate the Equal Protection Clause of the Fourteenth Amendment and imposed an unreasonable burden on interstate commerce in violation of Article I, Clause 8 of the Constitution (App. 8). A three-judge district court was convened (App. 16).

On appellees' motion for summary judgment, the district court held that Va. Code 28.1–60 deprived appellees of equal protection of the laws by discriminating against nonresident corporations with respect to commercial fishing for menhaden in the Chesapeake Bay (App. 17, 19). As to Va. Code 28.1–81.1, the court held that the Bartlett Act of 1964, 78 Stat. 194, as amended, 16 U.S.C. 1081–1094, "preempted" the state law (App. 20). (Although 16 U.S.C. 1091–1094 were enacted as the Contiguous Fisheries Zone Act of 1966, 80 Stat. 908, we shall refer to these sections as part of the amended Bartlett Act.)

The court enjoined appellant from enforcing Va. Code 28.1–60 and 28.1–81.1 "in respect to the prohibitions of the [appellees] to engage in fishing for men-

haden in Chesapeake Bay and in the Atlantic Ocean within three miles of the shore of Virginia" (App. 14–15).

SUMMARY OF ARGUMENT

I.

Appellees' vessels are licensed to engage in the fisheries under a federal law dating back to 1793. *Gibbons* v. *Ogden*, 9 Wheat. 1, held with respect to the same federal laws that a State could not prohibit a federally licensed vessel from engaging in the coasting trade in state waters. Likewise, a State may not prohibit a federally licensed vessel from engaging in the fisheries in state waters. The Virginia statutes in question deprive appellees and their vessels of the privileges granted by the federal license, the form of which has not changed since 1793. The Virginia statutes are therefore invalid under the Supremacy Clause.

There can be no doubt that the federal enrollment and licensing laws are a valid exercise of Congress' power under the Commerce Clause. Since the founding of this Nation, the fisheries have been considered one of the vital commercial enterprises in the United States, subject to regulation by Congress, as the statements of Pinckney during the Constitutional Convention in 1787 and Hamilton in *The Federalist No. 11* (Lodge ed. 1902) reveal. The menhaden fishery is no exception.

Menhaden migrate up and down the Atlantic coast; their capture in one State affects the number of these fish that may be harvested elsewhere; their capture anywhere requires navigation; they enter the streams

of foreign and domestic commerce in the form of industrial and agricultural products; the vessels fishing for them in the waters of the coastal states are engaged in a commercial venture subject to congressional regulation as surely as were the steamboats plying the inland waters between New York and New Jersey in the early 1800s.

II.

It is unnecessary for the Court to decide whether, as the district court held, Va. Code 28.1–81.1 is preempted by the Bartlett Act, as amended, 16 U.S.C. 1081–1094. In any event, the United States does not believe the Bartlett Act had this effect. The Act concerns fishing by foreign vessels; the vessels in this case are American. In prohibiting foreign fishing, Congress did not so occupy the general area of fisheries regulation that all state laws on the subject must fall even in the absence of conflicting federal legislation. The States have traditionally exercised regulatory authority over the coastal fisheries and Congress, by enacting the Bartlett Act, did not intend to affect the States' authority in this respect.

ARGUMENT

I

VIRGINIA CODE 28.1–60 AND 28.1–81.1 CONFLICT WITH THE FEDERAL ENROLLMENT AND LICENSING LAWS AND ARE THEREFORE UNCONSTITUTIONAL UNDER THE SUPREMACY CLAUSE TO THE EXTENT THAT THEY RENDER FEDERALLY LICENSED VESSELS INELIGIBLE FOR STATE COMMERCIAL MENHADEN FISHING LICENSES

Although the district court did not cite the decision, we believe *Gibbons* v. *Ogden*, 9 Wheat. 1, controls this case. The state statutes at issue—Va. Code 28.1–60 and 28.1–81.1—conflict with the federal enrollment and licensing laws. Under the Supremacy Clause of the Constitution (Art. VI, Clause 2), the Commonwealth of Virginia may not absolutely forbid appellees' vessels from fishing for menhaden in the Chesapeake Bay and the territorial sea off the coast of Virginia.

Appellees' vessels have been enrolled and licensed pursuant to 46 U.S.C. 251, 252, 263 (App. 21)[12] and are therefore "deemed vessels of the United States entitled to the privileges of vessels employed in the coasting trade or fisheries." 46 U.S.C. 251(a).[13] The federal license provides that the vessel is entitled to be employed in carrying on the "mackerel fishery," which includes the taking of menhaden.[14] 46 U.S.C. 263.

These provisions—46 U.S.C. 251, 252, 263—are derived directly from the Act of February 18, 1793, 1 Stat. 305, which, as Mr. Chief Justice Marshall pointed out in *Gibbons* v. *Ogden*, *supra*, 9 Wheat. at 211, was "an act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same."[15] The issue here is whether a State may absolutely bar a vessel of the United States licensed to engage in the fisheries from engaging in that activity in the State's waters. *Gibbons* v. *Ogden* presented the same question with respect to the coasting trade.[16]

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[12] In order to be licensed and enrolled a vessel must meet the same conditions required for registration of a vessel as an American vessel. 46 U.S.C. 252. Appellees have met these requirements and have satisfied the citizenship test (see 46 U.S.C. 11) for vessels engaged in the fisheries, as set forth in 46 C.F.R. 67.03–5(a), which now provides:

> The term "citizen," in the case of a corporation, means one which is incorporated under the laws of the United States, or of any State thereof, of which the president or other chief executive officer, and the chairman of the board of directors are citizens of the United States, so long as no more of its directors than a minority of the number necessary to constitute a quorum shall be noncitizens.

Compare 46 C.F.R. 67.03–5(b), which provides, in regard to vessels that seek to engage in the coasting trade, the additional requirement that 75 percent of the interest in the corporation must be owned by citizens as specified in Section 2 of the Shipping Act of 1916, 39 Stat. 729, as amended, 46 U.S.C. 802.

[13] See Article 5 of the Convention on the High Seas, April 29, 1958 [1962], 13 U.S.T. 2312, T.I.A.S. No. 5200, which obligates each participating nation to "fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag." As the Preamble to the Convention indicates (13 U.S.T. at 2314), this requirement reflects the long-standing principle of international law that each nation must identify the vessels subject to its sovereign jurisdiction and protection.

[14] 46 U.S.C. 263, sets forth the form of the license, which is granted for a one-year term and must be renewed. See also, 46 C.F.R. 67.07–13(b) ("A vessel engaged in taking fish of any other description [other than cod or whales] shall be licensed for the mackerel fishery").

[15] See Revised Statutes 4311; *Harman* v. *Chicago*, 147 U.S. 396, 405. See also Act of December 31, 1792, 1 Stat. 287.

[16] See generally 2 Warren, *The Supreme Court in United States History* 47–92 (1922), which contains extensive background material on the case.

Ogden ran a steamboat line on inland waters between Elizabethport, New Jersey, on the shore of Newark Bay, to New York on the Hudson.[17] He held a license granted by Livingston, who, along with Fulton, enjoyed the exclusive right under New York statutes to run steamboats in the waters of New York. Under these state laws, Ogden sought and obtained an injunction in New York State court against Gibbons, who had started an opposition steamboat line. 9 Wheat. at 1–3. Gibbons' vessels were federally licensed pursuant to the Act of February 18, 1793, *supra*. 9 Wheat. at 2, 211–213.

In his opinion for the Court, Mr. Chief Justice Marshall held that the federal licenses entitled the vessels to engage in the coasting trade and that the New York statutes, which sought to prevent federally licensed vessels from transporting passengers in New York waters, must fall under the Supremacy Clause. *Id.* at 211–222.

The Court's reasoning applies here. The 1793 federal statute at issue in *Gibbons* v. *Ogden* related to "the coasting trade and fisheries"[18] and the federal licenses granted under its successor statutes follow the same form in regard to both activities. 46 U.S.C. 263. The form of the license, in fact, has remained substantially the same since 1793.[19]

[17] The Court stated the question as "'whether the laws of New-York * * * have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him." 9 Wheat. at 210.

[18] See Act of February 18, 1793, 1 Stat. 305, 306 (Sections 2 and 4).

[19] Compare Section 4 of the Act of February 18, 1973, 1 Stat. at 307, with 46 U.S.C. 263.

"The word 'license,' means permission, or authority; and a license to do any particular thing, is a permission or authority to do that thing * * *," 9 Wheat. at 213. In *Gibbons* v. *Ogden*, the federal licenses did not specifically authorize "a voyage from New Jersey to New York," *id.* at 214; here, appellees' federal licenses do not specifically authorize fishing for menhaden in the waters in question. In both cases, however, the licenses confer that authority as surely as if the specific activities had been mentioned: there is no doubt that the voyages of Gibbons' vessels engaged those vessels in the coasting trade and that menhaden fishing by appellees' vessels would engage them in the fisheries. *Ibid.*

The purpose of the federal license is not, as *Gibbons* v. *Ogden* makes clear, "to confer the American character" on the vessel. *Ibid.* That is the function of enrollment. *Ibid.*[20] "The object of the license" is "to give permission to a vessel already proved by her enrolment to be American, to carry on the coasting trade" or, in this case, the fisheries. *Id.* at 215.[21]

The Virginia statutes, which exclude appellees' vessels entirely from the fishery at issue, deprive those vessels of the privileges conferred by the federal licenses. Appellant's contention that Virginia had good

[20] See, *e.g.*, *Pacific Shrimp Co.* v. *Department of Transportation*, 375 F. Supp. 1036, 1039 (W.D. Wash.).

[21] In light of *Gibbons* v. *Ogden*, the Court has consistently construed the federal enrollment and licensing laws as granting the authority to engage in the activity for which the license has been issued. *Kelly* v. *Washington*, 302 U.S. 1, 13; *Harman* v. *Chicago*, 147 U.S. 396, 404–405; *Cooley* v. *Board of Wardens*, 12 How. 299, 312.

reason for exercising its regulatory powers to prohibit appellees' vessels from fishing for menhaden in its waters[22] is beside the point.[23] Because the Virginia statutes conflict with federal law,[24] the federal law prevails under the Supremacy Clause. *Gibbons* v. *Ogden*, *supra*, 9 Wheat. at 210–211; *Richardson* v. *Harmon*, 222 U.S. 96.

Appellant contends, however, that the federal enroll-

[22] Brief for the Appellant 26–30.

[23] In any event, the evidence of fishing activity by foreign vessels, upon which appellant relies to justify the Virginia statutes (Brief at pp. 24–27), is irrelevant because the vessels excluded here were vessels of the United States.

As to the Chesapeake Bay, appellant offers no evidence that non-residents have depleted the menhaden fishery there. Instead, appellant merely predicts that this would occur because nonresidents would lack "the self-interest in preservation which motivates residents, who must depend upon a renewable resource for their livelihood" (*id.* at 33). But both resident and nonresident menhaden fishing firms depend upon a renewable resource for their livelihood. (Appellant apparently concedes that residents could engage in predatory fishing practices with impunity under Virginia law (Motion to Affirm, at p. 17).

While appellant argues that Virginia's laws are needed to avoid enforcement problems in regard to nonresidents (Br. 32–33) and noncitizens, even the exclusion of such persons will require enforcement.

[24] Va. Code 28.1–81.1 also conflicts with the federal enrollment and licensing laws in a somewhat different respect. Under federal law, appellees are considered citizens and their vessels are considered vessels of the United States entitled to the privileges of American vessels owned by citizens. See p. 12 and note 12, *supra*. By denying appellees the privilege of fishing for menhaden in Virginia waters on the basis that they are not citizens, Va. Code 28.1–81.1 is contrary to the federal laws prescribing who shall be considered a citizen for the purpose of engaging in the fisheries. Cf. *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410, 418.

ment and licensing laws cannot govern because the power of Congress under the Commerce Clause does not extend to the taking of fish (Brief, at p. 19). Mr. Chief Justice Marshall devoted the major portion of his opinion in *Gibbons* v. *Ogden* to a similar contention in regard to the same federal licensing law as applied to the coasting trade. 9 Wheat. at 187–209, 221–222. The business of fishing for menhaden is no less a part of interstate commerce than was the transportation of passengers from New Jersey to New York by steamboat, and the federal licensing law respecting both activities was within Congress' power to enact.

As Hamilton wrote in *The Federalist No. 11*, at 64 (Lodge ed. 1902), "There are rights of great moment to the trade of America which are rights of the Union —I allude to the fisheries * * *." Participating in the coastal fisheries, like participating in the coastal trade, depends on navigation and navigation is clearly within the commerce power. *Gibbons v. Ogden*, *supra*, 9 Wheat. at 192–193. Participating in the coastal fisheries, like participating in the coastal trade, depends in part on a continuous activity that transcends state and local boundaries.[25] Free swimming fish such as

[25] Even if the taking of menhaden in the waters of Virginia might be characterized as a "local act" (Brief for the Virginia Seafood Council, *et al.*, as *Amici Curiae*, pp. 9–10), it does not follow that it is beyond the reach of the Congress' power under the Commerce Clause. See, *e.g.*, *Wickard* v. *Filburn*, 317 U.S. 111, 125 ("But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.' ").

menhaden have no regard for state boundaries. They spawn primarily in the open ocean [26] and swim up and down the coastal waters of Virginia and other States along the eastern seaboard as part of their migratory cycle. See pp. 5 to 7, *supra*. Commercial fishing for menhaden in the Chesapeake Bay or along the Virginia coast affects the numbers of these fish that frequent the coastal waters of other States.[27] Menhaden taken in Virginia waters and elsewhere enter the streams of foreign and domestic commerce in the form of agricultural and industrial products.[28]

[26] The United States has entered into treaties with Poland and the Soviet Union in order to protect the menhaden fishery by preventing their capture during the spawning season on the high seas. See Agreement Between the Government of the United States of America and the Government of the Polish People's Republic Regarding Fisheries in the Western Region of the Middle Atlantic Ocean, June 13, 1970, 21 U.S.T. 1335, T.I.A.S. No. 6890; and Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on Certain Fishery Problems on the High Seas in the Western Areas of the Middle Atlantic Ocean, December 11, 1970, 21 U.S.T. 2664, T.I.A.S. No. 7009 (1971).

[27] Indeed, "21% of the recoveries from fish released in Chesapeake Bay in 1967 and 1968 occurred off the coasts of New York and New Jersey 1 yr later. These fish from Chesapeake Bay made up 72% of the catch in New York and New Jersey." Dryfoos, Cheek & Kroger, note 5, *supra*, at 733.

[28] Relying upon *McCready* v. *Virginia*, 94 U.S. 391, and the Submerged Lands Act, 67 Stat. 30, 43 U.S.C. 1311(a)(1), appellant argues that exclusion of persons or firms that fail to meet Virginia's citizenship and residency requirements is permissible, in part, because the State has title to and ownership of the menhaden located in the waters of the State (Brief, at 35). But see *Commonwealth* v. *Westcott*, 344 N.E. 2d 411 (Sup. Jud. Court Mass.), petition for a writ of certiorari pending, No. 75–1775.

The menhaden fishing industry, although one of our largest fishing industries, is not unique in this respect. As Hamilton's statement in *The Federalist No. 11* indicates, the pursuit, capture, processing and distribution involved in the exploitation of our coastal fisheries has from the beginning constituted—and continues to constitute—an integral part of this nation's interstate and foreign commerce. Indeed, during the Constitutional Convention in 1787 Charles Pinckney included "the fisheries" first among the five distinct commercial interests that would be subject to regulation by Congress in order to avoid "oppressive regulations" [29] from

Although language in the *McCready* opinion could be construed to support the State's claim of ownership of sedentary marine life located in the inland waters of a State, this Court, relying upon its decision in *Missouri* v. *Holland*, 252 U.S. 416, has subsequently affirmed the traditional principle denying ownership of free swimming fish until they have been reduced to possession. *Toomer* v. *Witsell*, 334 U.S. 385; *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410, 420–421. Similarly, while the Submerged Lands Act granted the States title to the submerged lands underlying State waters and the natural resources within those lands and waters (43 U.S.C. 1311(a)(1)), it could not and did not grant title to free swimming fish in those waters. It merely granted the States what the United States possessed: the jurisdiction and power to regulate and manage those resources. 43 U.S.C. 1311(a)(2), 1314; S. Rep. No. 94–416, 94th Cong., 1st Sess. 15 (1975).

[29] 5 Elliot's *Debates on the Adoption of the Federal Constitution* 489 (Madison's Report on the Debates) (Supp. 1845); 2 Farrand, *Records of the Federal Convention of 1787*, p. 449 (1966 ed.). Pinckney's proposed draft of the Constitution provided that Congress had power "To regulate commerce with all nations, and among the several states." 5 Elliot *supra*, at 130; 1 Farrand, *supra*, at 23; 3 Farrand, *supra*, App. D, at 598; but see *id.* at App. D, pp. 602–604 (regarding the question whether this version of Pinckney's draft was the same as that submitted by him during the Convention in 1787).

States pursuing their own interests.[30] Moreover, in order to protect the fisheries, Congress recently enacted legislation to extend exclusive jurisdiction over fishing to a limit of two hundred miles from our coastline and to establish a regulatory system to manage the fishery resources of those waters. Fishery Conservation and Management Act of 1976, Pub. L. 94–265, 90 Stat. 331, 16 U.S.C. 1801, *et seq.* See note 40, *infra.*

The federal enrollment and licensing laws with respect to vessels engaged in the fisheries are therefore a valid exercise of Congress' power under the Commerce Clause.[31] The Virginia statutes seek to exclude, not regulate, federally licensed vessels whose owners fail to meet the state's citizenship and residency requirements. Virginia's statutes discriminate against such vessels and, like the state legislation at issue in

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[30] As to the commercial importance of the fisheries, see the remarks of Mr. Grayson during the Virginia Debates on Adoption of the Federal Constitution in 3 Elliot *supra,* 277–278, 343 (2d ed. 1854); and the February 1, 1791, report of Thomas Jefferson, then Secretary of State, to the House of Representatives regarding the need for the federal government to fulfill its "obligation of effectuating free markets for [the fisheries]." 1 *American State Papers, Commerce and Navigation 1789–1815,* p. 12 (1832).

For a history of the early fisheries of the United States, see Sabine, *Report on the Principal Fisheries of the American Seas,* H.R. Exec. Doc. No. 23, 32d Cong., 2d Sess. 181 (1852).

[31] See also Story, 2 *Commentaries on the Constitution* 25 (2d ed. 1851):

> It is not doubted, that [the commerce power] extends to the regulation of navigation, and to the coasting trade and fisheries, within, as well as without, any state, wherever it is connected with the commerce or intercourse with any other state, or with foreign nations.

Gibbons v. *Ogden,* have "come into collision with an act of Congress." 9 Wheat. at 210.[32] Under the Supremacy Clause, the Virginia statutes are unconstitutional to the extent that they render federally licensed vessels ineligible to participate in the menhaden fishery.[33]

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[32] Relying upon *Manchester* v. *Massachusetts,* 139 U.S. 240, and *Toomer* v. *Witsell,* 334 U.S. 385, appellant argues that this Court has already rejected the theory that federal enrollment and licensing confers upon vessel owners the right to take fish from coastal waters of the United States. Neither of these cases supports appellant's position.

In *Manchester* v. *Massachusetts* this Court upheld a state statute regulating fishing for menhaden in state waters. The Court did not address the question whether a federal license to engage in the coastal fisheries constituted a grant to fish in those waters. Instead, the Court concluded only that a State could regulate activities of vessels fishing in state waters, including vessels fishing under a federal license. 139 U.S. at 266.

In *Toomer* v. *Witsell* the Court struck down a South Carolina law that discriminated against nonresidents in regulating commercial shrimp fishing in the territorial sea off the coast of that State. The Court did not address the question whether a federal license to engage in the coastal fisheries constituted a grant of the privilege to fish. The Court did conclude, however, that state regulations imposing a discriminatory license fee on vessels owned by nonresidents violated the Privileges and Immunities Clause and that the requirement that shrimp fishing boats dock at a South Carolina port and unload, pack and stamp their catch unconstitutionally burdened interstate commerce. 334 U.S. at 395–406.

[33] The United States does not dispute Virginia's authority to manage the coastal fisheries through reasonable regulations in the absence of federal legislation on the subject. Compare *Toomer* v. *Witsell, supra*; *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440.

II

THE BARTLETT ACT DOES NOT PREEMPT STATE JURISDICTION TO REGULATE FISHING BY VESSELS OF THE UNITED STATES WITHIN THE TERRITORIAL SEA

As the foregoing discussion indicates, we believe *Gibbons* v. *Ogden* disposes of this case. It is therefore unnecessary for this Court to decide whether, as the court below held, Virginia's statute denying commercial fishing licenses to noncitizens (Va. Code 28.1–81.1) is preempted by the Bartlett Act, as amended, 16 U.S.C. 1081–1094 (App. 20–21).[34] However, because we do not agree with the district court's view of the effect of the Bartlett Act, we shall explain the basis for our disagreement.

The Bartlett Act is designed to prevent foreign fishing in the coastal waters of the United States [35] by prohibiting foreign vessels from taking fish within twelve nautical miles of the United States coast. 16 U.S.C. 1081, 1091.[36] The Act filled a gap in existing law, which (as we have discussed above) provided for participa-

[34] For the same reason it is unnecessary for the Court to decide whether, as the district court held, Va. Code 28.1–60 violates the Equal Protection Clause by preventing nonresidents from fishing for menhaden in the Chesapeake Bay. Cf. *Toomer* v. *Witsell*, 334 U.S. 385.

[35] See generally Fidell, *Ten Years Under the Bartlett Act: A Status Report on the Prohibition on Foreign Fishing*, 54 Boston Univ. L. Rev. 703 (1974).

[36] Violations are punishable by fines of not more than $100,000 or imprisonment for not more than one year, or both. 16 U.S.C. 1082(a). In addition, the offending vessel may be seized and forfeited. 16 U.S.C. 1082(b).

tion in the nation's fisheries by vessels of the United States (46 U.S.C. 251) but provided no recourse against fishing by foreign vessels except the boarding of the vessels by the Coast Guard and the escorting of the ship to the high seas. S. Rep. No. 500, 88th Cong., 1st Sess. 5, 11 (1963). See *United States* v. *Ayo-Gonzalez*, 536 F. 2d 652, 658–659 (C.A. 5).

It is apparent that on the facts of this case, the application of Va. Code 28.1–81.1 to appellees does not conflict with the Bartlett Act. Appellees' vessels are vessels of the United States;[37] the Act concerns only foreign vessels.[38]

Likewise, we see no basis for concluding that the Bartlett Act has so occupied the field that States are precluded from regulating the fisheries even though their laws do not conflict with the provisions of the

[37] See Section 1 of the Act, 16 U.S.C. 1081, which provides in relevant part:

> It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States * * *.

[38] Appellant contends that the Bartlett Act did not preempt state jurisdiction to regulate foreign vessels fishing in the territorial sea, suggesting that the coastal States possess that jurisdiction. Brief, at 5, 6, 13, 15. We do not believe that issue should be decided in this case. No party to these proceedings denies that appellees' vessels are vessels of the United States as that term is used in the Bartlett Act. *Id.* at 13, 15. Moreover, there is pending before this Court in *United States* v. *Florida and Texas*, No. 54, Original, a motion for leave to file a counterclaim concerning state jurisdiction over foreign vessels in the territorial sea. The United States is opposing that counterclaim.

Act. See *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325, 327; *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 444–448. The Virginia statute at issue, as applied here, does not frustrate or stand as an obstacle to the achievement of Congress' goal in the Bartlett Act of preventing fishing by foreign vessels.[39] Moreover, in light of the narrow purpose of the Bartlett Act, it is hardly so pervasive a scheme of federal regulation " 'as to make reasonable the inference that Congress left no room for the States to supplement it.' " *Pennsylvania* v. *Nelson*, 350 U.S. 497, 502, quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230.

Indeed, the jurisdiction and authority of the coastal States to regulate fishing by United States vessels in waters within state boundaries has long been recognized. See, *e.g.*, Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301, 1311; *Toomer* v. *Witsell*, *supra*, 334 U.S. at 393. The Bartlett Act merely complements the State regulatory systems and was prompted by the increasing numbers of foreign violations of our territorial waters that accompanied the tremendous increase in foreign exploitation of the fishing grounds adjacent to our coasts during the two years preceding passage of that Act. H.R. Rep. No. 1356, 88th Cong., 2d Sess. 4, 10 (1964); S. Rep. No. 91–1320, 91st Cong., 2d Sess. 1–4 (1970).

[39] See *Hines* v. *Davidowitz*, 312 U.S. 52, 67 ("Our primary function is to determine whether, under the circumstances of this particular case, [the state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"), quoted in *Goldstein* v. *California*, 412 U.S. 546, 561.

Congress itself emphasized that it was not diminishing the jurisdiction of the States: the Senate Commerce Committee stated that the "bill will not preempt the States of their powers against trespassers of their territorial seas." S. Rep. No. 500, 88th Cong., 1st Sess. 4 (1963). Soon after the enactment of the Bartlett Act, Congress again emphasized its desire not to preempt the jurisdiction of the States to regulate fishing by vessels of the United States in the territorial sea adjacent to their coasts. In the Contiguous Fisheries Zone Act of 1966, 16 U.S.C. 1091, *et seq.*, Congress extended the prohibition against foreign fishing, established in the Bartlett Act for the territorial sea, seaward to a distance of twelve miles. 16 U.S.C. 1091. In doing so, Congress specifically provided that nothing in that Act shall be construed as diminishing the jurisdiction of the States over the natural resources of the territorial sea, 16 U.S.C. 1094, which is a still further indication that the Bartlett Act did not preempt the state jurisdiction over the fisheries. See also H.R. Rep. No. 2086, 89th Cong., 2d Sess. 10 (1966) (recognizing "the jurisdiction of the States within the 3-mile coastal area").[40]

[40] See also Section 306(b) of the Fishery Conservation and Management Act of 1976, 16 U.S.C. 1856, discussed at p. 20, *supra*, in which Congress explicitly provided that nothing in the Act is intended to diminish the jurisdiction the States exercise over fishing within state boundaries and provided for a limited preemption of state jurisdiction within the territorial seas when State regulation conflicts with federal regulations with respect to a fishery extending beyond state waters. See S. Rep. No. 94–416, 94th Cong., 1st Sess. 5, 15, 41 (1975).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

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APPENDIX

Section 251 of Title 46 U.S.C. provides as follows:

(a) Vessels of twenty tons and upward, enrolled in pursuance of sections 251 to 255, 258, 259, 262 to 280, 293, 306 to 316, 318, 321 to 330 and 333 to 335 of this title, and having a license in force, or vessels of less than twenty tons, which, although not enrolled, have a license in force, as required by such sections, and no others, shall be deemed vessels of the United States entitled to the privileges of vessels employed in the coasting trade or fisheries. Except as otherwise provided by treaty or convention to which the United States is a party, no foreign-flag vessel shall, whether documented as a cargo vessel or otherwise, land in a port of the United States its catch of fish taken on board such vessels on the high seas or fish products processed therefrom, or any fish or fish products taken on board such vessel on the high seas from a vessel engaged in fishing operations or in the processing of fish or fish products.

(b) Subsection (a) of this section shall not be deemed to prohibit the landing by a foreign-flag vessel of not more than fifty feet overall length in a port of the Virgin Islands of the United States for immediate consumption in such islands of its catch of fresh fish, whole or with the heads, viscera, or fins removed, but not frozen, otherwise processed, or further advanced. No fish landed under this authorization shall be sold or transferred except for immediate consumption. Sale or transfer to an agent, representative, or employee of a freezer or cannery shall be deemed to be prohibited in

the absence of satisfactory evidence that such sale or transfer is for immediate consumption. For the purposes of this subsection, the term "immediate consumption" shall not preclude the freezing, smoking, or other processing of such fresh fish by the ultimate consumer thereof.

(c) Any fish landed in the Virgin Islands of the United States which are retained, sold, or transferred other than as authorized in subsection (b) of this section shall be liable to forfeiture and any person or persons retaining, selling, transferring, purchasing, or receiving such fish shall severally be liable to a penalty of $1,000 for each offense, in addition to any other penalty provided in law.

Section 252 of Title 46 U.S.C. provides as follows:

In order for the enrollment of any vessel, she shall possess the same qualifications, and the same requirements in all respects shall be complied with, as are required before registering a vessel, and the same powers and duties are conferred and imposed upon all officers, respectively, and the same proceedings shall be had, in enrollment of vessels, as are prescribed for similar cases in registering; and vessels enrolled, with the masters or owners thereof, shall be subject to the same requirements as are prescribed for registered vessels.

Section 263 of Title 46 U.S.C. provides as follows:

The form of a license for carrying on the coasting trade or fisheries shall be as follows:

"License for carrying on the (here insert 'coasting trade', 'whale fishery', 'mackerel fishery', or 'cod fishery', as the case may be).

"In pursuance of Title L, 'Regulation of Vessels in Domestic Commerce', of the Revised Statutes of the United States, (inserting here the name of the husband or managing owner, with his occupation and place of abode, and the name of the master, with the place of his abode), having sworn that the (insert here the description of the vessel, whether ship, brigantine, scow, schooner, sloop, or whatever else she may be), called the (insert here the vessel's name), whereof the said (naming the master) is master, burden (insert here the number of tons, in words) tons, as appears by her enrollment, dated at (naming the district, day, month, and year, in words at length, but if she be less than twenty tons, insert, instead thereof, 'proof being had of her admeasurement'), shall not be employed in any trade, while this license shall continue in force, whereby the revenue of the United States shall be defrauded, and having also sworn (or affirmed) that this license shall not be used for any other vessel, or for any other employment, than is herein specified, license is hereby granted for the said (inserting here the description of the vessel) called the (inserting here the vessel's name), to be employed in carrying on the (inserting here 'coasting trade', 'whale fishery', 'mackerel fishery', or 'cod fishery', as the case may be), for one year from the date hereof, and no longer. Given under my hand and seal, at (naming the said district), this (inserting the particular day) day of (naming the month), in the year (specifying the number of the year in words at length);": *Provided*, That vessels of five net tons and over entitled under the laws of the United States to be enrolled and licensed or licensed for the

coasting trade may be licensed for the "coasting trade and mackerel fishery", and shall be deemed to have sufficient license for engaging in the coasting trade and the taking of fish of every description, including shellfish: *Provided further*, That the provisions of sections 310 and 311 of this title shall be, and are hereby, made applicable to vessels so licensed: *And provided further*, That vessels operating on the Great Lakes and their connecting and tributary waters under enrollment and license issued in conformity with the provisions of section 258 of this title, shall be deemed to have sufficient license for engaging in the taking of fish of every description within such waters without change in the form of enrollment and license prescribed under the authority of that section.

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